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JUN 22 1982
ALEXANDER L. STEVAS,
CLERK

81-2337
No.

In the Supreme Court of the United States

OCTOBER TERM, 1981

JOHN R. BLOCK, SECRETARY OF AGRICULTURE ET AL.
PETITIONERS

v.

THE STATE OF NORTH DAKOTA, EX REL. BOARD OF UNIVERSITY AND SCHOOL LANDS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether a state's action to quiet title against the United States is subject to the 12-year statute of limitations in the Quiet Title Act, 28 U.S.C. 2409a(f).*

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* Petitioners, in addition to the Secretary of Agriculture, named in the caption, are James G. Watt, Secretary of the Interior; Robert F. Burford, Director of the United States Bureau of Land Management; and R. Max Peterson, Chief of the United States Forest Service. Petitioners are all successors in office to the defendants named in the complaint. See Rule 40.3 of the Rules of this Court.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Agriculture, the Secretary of the Interior, the Director of the United States Bureau of Land Management, and the Chief of the United States Forest Service, petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-13a) is reported at 671 F.2d 271. The opinion of the district court entered on February 4, 1981 (App. C, *infra*, 17a-28a) is reported at 506 F. Supp. 619. The memorandum and order of the district court entered on February 21, 1980 (App. B, *infra*, 14a-16a), is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 12, 1982 (App. E, *infra*, 31a-32a), and a timely petition for

rehearing was denied on March 15, 1982 (App. F, *infra*, 33a). On June 4, Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including July 13, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

1. 28 U.S.C. 2409a provides in pertinent part:

> (a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands * * *.
>
> (b) The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days * * *.
>
> * * * * *
>
> (f) Any civil action under this section shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

2. 28 U.S.C. 1346(f) provides:

> The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

STATEMENT

1. The United States is the owner of land along the Little Missouri River in North Dakota and claims title to the bed of that river as a riparian landowner (App., *infra*, 3a n.2, 23a). Since at least 1955, the federal government has issued oil and gas leases on the riverbed (*id.* at 2a).

On October 31, 1978, respondent (hereinafter "the State") commenced this action by filing a complaint against predecessors of the petitioning federal officials, seeking to have them enjoined from issuing mineral leases on the riverbed or otherwise exercising privileges of ownership there (App., *infra*, 2a). The complaint alleged that the Little Missouri River had been navigable at the time of the State's admission to the Union in 1889, and that the State had therefore become the owner of the riverbed at that time under the equal footing doctrine. In addition to injunctive relief, the State sought a declaration that the river was "navigable * * * for the purposes of determining ownership of the bed."

The complaint alleged jurisdiction under 28 U.S.C. 1331 (federal question), 28 U.S. U.S.C. 1361 (mandamus), 28 U.S.C. 2201-2202 (declaratory judgment and further relief), and 5 U.S.C. 701-706 (the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. 551 *et seq*). The district court denied cross-motions for summary judgment, but held that the proper basis for the suit was the Quiet Title Act, [1] and directed that the complaint be dismissed unless the State amended it to recite "an adequate jurisdictional basis" (App., *infra*, 14a-16a).

The State filed an amended complaint alleging jurisdiction in part on 28 U.S.C. 2409a and seeking the same injunctive and declaratory relief, although it did not name the United States, whose claim to title it was disputing, as a defendant.

The federal defendants maintained throughout the district court proceedings (1) that the Little Missouri River had not been navigable at the time of the State's entry into the Union and that therefore the riverbed was not sovereign land of the State and (2) that the State's action challenging the federal exercise of ownership over the riverbed was, in any event, barred by the 12-year limitations provision of the Quiet Title Act, 28 U.S.C. 2409a(f).

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[1] The Act of Oct. 25, 1972, Pub. L. No. 92-562, 86 Stat. 1176, codified at 28 U.S.C. 2409a, 28 U.S.C. 1346(f), and 28 U.S.C. 1402(d).

After a one-day trial, the district court held that the Little Missouri River had been navigable at the time of statehood (App., *infra*, 20a-21a) and that therefore title to the riverbed vested in the State under the equal footing doctrine enunciated in *Shively* v. *Bowlby*, 152 U.S. 1, 26-31 (1894). [2] It further held that the action was not barred by the statute of limitations, because the limitations provision of the Quiet Title Act applied only to natural persons or corporations and not to a "sovereign" with respect to "trust lands held in its sovereign capacity" (App., *infra*, 25a-27a). Because the district court found the limitations provision inapplicable, it did not rule on the federal defendants' allegation that the State had had notice of the federal claim to the riverbed more than 12 years before this lawsuit was brought. [3]

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[2] The finding of navigability was based on documentary evidence submitted by the State. (The State presented no trial witneses.) The district court relied essentially on (1) an account of a trip down the Little Missouri in 1804 by a French Canadian, Baptiste LePage, who concluded that the river was essentially non-navigable, although apparently he managed the trip in his canoe; (2) a report of a logging operation in 1881-1882 that managed to float some logs down the river, although the enterprise ended in bankruptcy; and (3) some present-day canoe traffic (App., *infra*, 20a-21a.) The court also concluded (*id.* at 21a) that the river has "continue[d] to be navigable to this date."

[3] The government submitted evidence in the district court proceedings showing (1) that the federal riverbed leasing program had been in effect since at least 1955 (Tr. 26-27; Defendants' Exh. I); (2) that five leases issued in 1962 were competitive leases publicly advertised in the State (Tr. 104-107); (3) that an oil company official had written the Land Department of the State Board of University and School Land in 1966, advising the Department that the federal government was issuing leases in the riverbed and that State officials might wish to confer with the Department of the Interior to establish the State's rights in the riverbed (Defendants' Exh. L at 60); (4) that the Bureau of Land Management had, in 1955, sent an inquiry to the State's Attorney General, asking whether, in his view, the Little Missouri River had been navigable at the time of statehood (Exh. to Defendants' Supp. Brief, Dec. 5, 1979; Tr. 123); and (5) that an Assistant

In its final judgment, the court declared, *inter alia* (App., *infra*, 29a-30a), that "[t]itle to the bed of the Little Missouri River within the State of North Dakota, excluding [a specified area], is hereby quieted in the State of North Dakota," and it directed (*id.* at 30a) "the United States" to "cease and desist from further developing or otherwise exercising privileges of ownership" upon that riverbed within the State. [4]

2. On cross-appeals, the court of appeals affirmed the district court's judgment in all respects (App., *infra*, 1a-13a). It concluded (*id.* at 4a-9a) that the limitations provision in the Quiet Title Act, 28 U.S.C. 2409a(f), cannot be asserted by the United States against states, at least where "public trust lands" are concerned. On the merits, it affirmed the district court's finding with respect to navigability of the Little Missouri at the time of the State's admission to the Union (App., *infra*, 10a-13a), although it noted that "the evidence in the record concerning navigability is rather thin" (*id.* at 13a). Because it found district court jurisdiction under the Quiet Title Act, the court of appeals declined to rule on the State's contentions that the federal question provision, 28 U.S.C. 1331, was an adequate jurisdictional basis for the action and that if any statutory waiver of sovereign immunity was required, such a waiver was to be found in the Administrative Procedure Act, 5 U.S.C. 702 (App., *infra*, 4a n.4, 9a; State C.A. Br. 41-47).

In its ruling on the statute of limitations question, the court of appeals started from the premise that, "[u]nder the rule of *quod nullum tempus occurrit regi* the defense of statute of limitations and laches cannot be asserted against a sovereign"

Attorney General had responded, stating that he was informed by "the State Land Commissioner and the Water Conservation Commission that the Little Missouri River is not now and has not been considered navigable" *(ibid.)*.

[4] The portion of the riverbed excluded from the judgment was land within the Fort Berthold Indian Reservation occupied by the Three Affiliated Tribes (App., *infra*, 19a-20a). See 28 U.S.C. 2409a(a). The Tribes were not parties to this litigation (App., *infra*, 19a-20a).

(App., *infra*, 4a), and that in American law, exemplified by *Weber* v. *Board of Harbor Commissioners*, 85 U.S. (18 Wall.) 57, 70 (1873), the rule is qualified only by an exception for cases in which "the statute expressly designates the sovereign or when the sovereign must necessarily be subject to the statute as determined by legislative intent" (App., *infra*, 5a). The court also emphasized the character of the lands in question as "[p]ublic trust lands," which it defined as "lands held in trust for the citizens of a state [as] distinguished from lands which the State holds in a proprietary capacity" (*ibid.*).

The court noted (App., *infra*, 6a) that states are not specifically mentioned in 28 U.S.C. 2409a(f), which applies to "[a]ny civil action" brought under 28 U.S.C. 2409a, and that they were not expressly referred to in the legislative history of the Quiet Title Act. It found in this congressional silence an intent to exclude the States from the application of this provision of the Act (App., *infra*, 6a). It also concluded (*id.* at 7a), on the basis of the enactment in 1953 of the Submerged Lands Act, 43 U.S.C. 1301 *et seq.* (which confirmed in the States title to lands beneath waters navigable at the time of statehood) that Congress would find the policies of limitations provisions—notably the desirability of limiting the litigation of stale claims—inapplicable to claims asserted by states.

The court briefly considered the federal defendants' contention that the limitations provision in 28 U.S.C. 2409a(f) is a condition of the waiver of sovereign immunity by the United States and that such waivers must be strictly construed; but it concluded (App., *infra*, 7a) that this was merely a principle to be weighed against the State's immunity from limitations provisions that do not expressly mention the States. In balancing the two, the court concluded (*id.* at 7a-8a) that because "the interest of the people of the State of North Dakota in quieting title to public trust lands is great" and because Congress could, in any event, amend the Quiet Title Act to make the limitations provision expressly applicable to the States, the State's interest should prevail. It rejected authorities cited by the federal defendants, characterizing them (*id.* at 8a-9a) as distinguishable or without precedential value.

REASONS FOR GRANTING THE PETITION

In enacting the Quiet Title Act, Congress declared that "*[a]ny* civil action under this section shall be barred unless it is commenced within twelve years of the date upon which it accrued." 28 U.S.C. 2409a(f) (emphasis added). The court of appeals, without any support in the language of the Act or its legislative history, has held that this provision does not apply to the States. Because the court's decision conflicts with precedents of this Court and of other courts of appeals, and because the issue is important to the application of the Quiet Title Act and other statutes that authorize suits against the United States but subject the authorization to a period of limitation, we seek review by this Court.

1.a This Court has consistently held that the United States may be sued only when it consents to be sued, and that the "terms of its consent to be sued in any court define that court's jurisdiction." *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980), quoting *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941); *United States* v. *Shaw*, 309 U.S. 495, 500-501 (1940); *Munro* v. *United States*, 303 U.S. 36, 41 (1938). This requirement of consent applies to the States as well as to private citizens, for as this Court has observed (*California* v. *Arizona*, 440 U.S. 59, 61-62 (1979), quoting *Kansas* v. *United States*, 204 U.S. 331, 342 (1907)):

> "It does not follow that because a State may be sued by the United States without its consent, therefore the United States may be sued by a State without its consent. Public policy forbids that conclusion."

It is equally well settled that the terms of the consent to suit—*i.e.*, the conditions on which the United States has agreed to waive its sovereign immunity—are to be strictly observed and that exceptions to those conditions based on implication are not to be recognized. *Soriano* v. *United States*, 352 U.S. 270, 276 (1957).

It is through the Quiet Title Act that the United States has consented to suits, like the present action, challenging its claim of title to land. 28 U.S.C. 2409a. *California* v. *Arizona*, *supra*,

440 U.S. at 63-65. [5] The court below has essentially held that the State may avail itself of the benefits of Section 2409a by bringing this action under it, but need not abide by the time limitation Congress placed upon "[a]ny civil action brought under this section." The court has cited no authority that justifies such a refusal to apply the rule that waivers of sovereign immunity must be strictly construed.

b. In support of its conclusion that the terms of the Quiet Title Act waiver should not apply at all to this action, the court cites (App., *infra*, 4a-5a) cases reciting the rule *quod nullum tempus occurrit regi*—that a statute of limitations does not run against a sovereign, either state or federal, unless the sovereign is "expressly designated, or necessarily included by the nature of the mischiefs to be remedied." *Weber* v. *Board of Harbor Commissioners*, 85 U.S. (18 Wall.) 57, 70 (1873). Accord, *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 132-133 (1938). Because states are not expressly designated in

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[5] In *California* v. *Arizona*, the Court, seeking to avoid a constitutional question, held that in the jurisdictional provision of the Quiet Title Act, 28 U.S.C. 1346(f), granting exclusive original jurisdiction to federal district courts over actions under 28 U.S.C. 2409a, Congress intended simply to keep such actions out of state courts rather than to deprive the Court of its original jurisdiction, conferred by Article III, Section 2 of the Constitution, over "Cases * * * in which a State shall be Party." The case was thus allowed to proceed in the Court as a suit "brought under [the Quiet Title Act] waiver" (440 U.S. at 65).

The United States asserted a limitations defense against California and Arizona in that action as to some of the land in dispute (440 U.S. at 63 n.4). The areas in question were lands beneath navigable waters that the two States claimed under the "equal-footing" doctrine (*id.* at 60). The United States thereafter litigated its Section 2409a(f) limitations defense before the Special Master, who rejected it on the merits, finding that the United States had not given the States notice as to a definite federal claim more than 12 years before the suit was brought. See *California* v. *Arizona*, No. 78, Original, 1980 Term, Report of the Special Master at 2; Memorandum in Support of Joint Motion for Entry of Decree, App. B, 4a-5a.

28 U.S.C. 2409a(f) or mentioned in its legislative history, the court concluded that the limitations provision should not apply.

But in none of the cases on which the court of appeals relies is the limitations provision a condition on a waiver of sovereign immunity. When the national sovereign invokes a limitations provision that qualifies its consent to suit, that provision applies even against a state, regardless of whether the provision mentions the States. Thus, in *United States* v. *Louisiana*, 127 U.S. 182, 192 (1888), the Court held that Louisiana's monetary claim against the United States was barred by a general limitations provision, Rev. Stat. 1069 (1878 ed.), that, like 28 U.S.C. 2409a(f), contains no specific reference to the States. [6] Accord, *United States* v. *442,978 Square Feet of Land, San Francisco*, 445 F.2d 1180, 1187-1188 (9th Cir. 1971) (general limitations provision in Tucker Act bars State's claim for alleged taking of its property without just compensation); *California* v. *United States*, 132 F. Supp. 208 (Ct.Cl. 1955) (same).

The court of appeals also relies on *Weber* v. *Board of Harbor Commissioners*, *supra*, and *United States* v. *California*, 332 U.S. 19 (1947), for the proposition that where "public trust lands" are concerned, a sovereign cannot be barred by laches or limitations provisions from suing to assert title to them. The reasoning of those cases, however, does not apply where the national sovereign is the party invoking such a defense as to lands that it holds. In *Weber*, the party invoking the limitations provision was a private individual; recognition of the defense in such cases would mean that, through the negligence of state agents, who might have no incentive to prosecute the State's claims (85 U.S. at 70), lands held in trust for the public could "pass into private ownership" without the State's consent (*id.*

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[6] Rev. Stat. 1069 (1878 ed.) provided in pertinent part:

> Every claim against the United States, cognizable by the Court of Claims, shall be forever barred unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the Secretary of the Senate or the Clerk of the House of Representatives as provided by law, within six years of after the claim first accrues * * *.

at 69). That is not the case when a state disputes the right of the United States to an interest in land. As the Court pointed out in *United States* v. *California*, *supra*, 332 U.S. at 40, the United States "holds its interests * * * in trust for all the people." [7]

Finally, the court of appeals turns on its head the settled rule for construing conditional waivers of sovereign immunity when it suggests (App., *infra*, 6a) that the *absence* of any reference to the States in the comments on Section 2409a(f) in the House Report (H.R. Rep. No. 92-1559, 92d Cong., 2d Sess. 3, 5 (1972)) reveals a congressional intent to exclude the States from the reach of that limitations provision. The strict construction rule would ordinarily require that the literal terms of a limitations provision be given effect regardless of what comments may be found in the legislative history. Certainly, a court should not be free to refuse to give effect to the unambiguous language of a provision conditioning a waiver of sovereign immunity simply because it can find no statements in congressional reports affirming that the provision means what it says. See *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 592 (1980). The reliance on congressional silence is particularly troubling in this case, in view of the fact that the court did not conclude that the absence of any reference to the States in other sections of the House Report warranted excluding the

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[7] *Guaranty Trust Co.* v. *United States*, *supra*, is another case invoked by the court of appeals that contains language running counter to the court's analysis. In *Guaranty Trust*, the Court held that a foreign sovereign could not invoke the protection of a statute of limitations when suing in a state or federal court. The Court concluded (304 U.S. at 136; emphasis added) that the "public interest *of the forum*" that is recognized in the *nullum tempus* rule, which protects a domestic sovereign against the loss of public rights or property through the negligence of its officers, does not go so far as to protect the rights of foreign governments. But the forum in this case is a federal court, through which the federal government has afforded a remedy when certain conditions are met; and that forum does not favor the interests of a plaintiff state over the federal interest in strict observance of the conditions attached to a waiver of the immunity of the United States.

States from the benefits of the waiver of sovereign immunity in the Quiet Title Act. [8]

2. As indicated in Point 1, *supra*, the court of appeals' opinion conflicts with decisions of this Court respecting the rule of strict construction of waivers of sovereign immunity and with *United States* v. *Louisiana*, *supra*, and cases from the Ninth Circuit and the Court of Claims, in which a general statute of limitations provision was applied to a state's claim.

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[8] The only ground of jurisdiction recognized by the district court was 28 U.S.C. 2409a (App., *infra*, 14a-16a), and the court of appeals properly did not disturb this conclusion (*id.* at 9a). (It would be more accurate, however, to say that the district court's jurisdiction is predicated on 23 U.S.C. 1346(f), and that the waiver of sovereign immunity is embodied in 28 U.S.C. 2409a.)

The alternate grounds of jurisdiction suggested by the State (see page 3, *surpa*) did not include a waiver of sovereign immunity covering the subject matter of this suit, which culminated in a judgment quieting title in the State to land that the United States had claimed and over which it had exercised privileges of ownership (App., *infra*, 29a-30a). The State's contention below that Congress had waived the immunity of the United States for such a suit as this in a judicial review provision of the Administrative Procedure Act, as amended in 1976, 5 U.S.C. 702, is groundless. As that section expressly provides, it does not confer "authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." The House Report on the 1976 amendments to the APA makes it clear that the amended section "is not intended to permit suit in circumstances where other statutes forbid *or limit* the relief sought" and that conditions on the right to sue in statutes such as the Tucker Act therefore cannot be evaded through the device of an APA action. H.R. Rep. No. 94-1656, 94th Cong., 2d Sess. 12-13 (1976). The remarks are equally applicable to the Quiet Title Act. The careful limitations on that remedy are not to be circumvented by the expedient of naming federal officers rather than the United States as defendants and requesting a declaration that the Little Missouri is "navigable for the purposes of determining ownership" (Amended Complaint, dated Mar. 11, 1980, at 4) rather than a judgment quieting title in the plaintiff. Cf. *Cory* v. *White*, No. 80-1556 (June 14, 1982), slip. op. 5-6.

The court of appeals' analysis is also completely at odds with the Ninth Circuit's decision in *Park County, Montana* v. *United States*, 626 F.2d 718 (1980), *cert. denied*, 449 U.S. 1112 (1981). In that case a county had asserted that the limitations provision in the Quiet Title Act did not apply to it because it was a unit of state government, clothed with the State's sovereign immunity. The Ninth Circuit rejected the argument, holding that 28 U.S.C. 2409a(f) applies to governmental entities as well as to individuals. It explained (626 F.2d at 720):

> The district court concluded that it had no power to engraft exceptions for any reason to the language of 28 U.S.C. 2409a(f) and that the 12-year statute of limitations should be strictly construed. * * *.
>
> Furthermore, * * * we find the cases cited by appellants to be inapplicable because they are based primarily in common law doctrines of sovereignty and state court decisions interpreting the extent of this sovereignty. Unlike those cases, this case involves a federal statute of limitations in a suit against the United States in federal forum. Such statutes of limitation are generally applicable to governmental entities as well as individuals. See *United States* v. *Louisiana*, 127 U.S. 182, 185, 192 * * * (1888); *California* v. *United States*, 132 F. Supp. 208 (Ct.Cl. 1955).

The court below found *Park County* distinguishable because it did not concern the State of Montana itself; but it is clear nonetheless from the reasoning of *Park County* that the Ninth Circuit takes a contrary view of the question decided by the court of appeals in this case.

3. The question is important. Actions by states to quiet title against the United States occur with reasonable frequency; and the fact that in this case the federal government believes it has a meritorious statute of limitations defense to assert does not make this action unique. In the past three years alone, the limitations defense has been involved in *California* v. *Arizona*, *supra.*; *Nevada* v. *United States*, 628 F.2d 1357 (9th Cir. 1980) (table), *cert. denied*, 450 U.S. 995 (1981); and in the present case. The defense has also been asserted against a state or a unit of government asserting a state's immunity in

pending actions in *Utah* v. *United States*, Civil No. C-79-0302J (D. Utah, filed May 22, 1979); *Papasan, Superintendent of Board of Education* v. *United States*, Civil No. 81-90 (N.D. Miss., filed June 12, 1981); (school board invoking State's immunity) and *California ex rel. State Lands Commission* v. *United States*, 512 F. Supp. 36 (N.D. Cal. 1981). [9] The question of the applicability of Section 2409a(f) has also been raised by Guam and Puerto Rico. *Commonwealth of Puerto Rico* v. *United States*, Civil No. 80-2079-C.C. (D.P.R., filed Sept. 24, 1980); *Government of Guam* v. *United States*, Civil No. 82-0001 (D. Guam, filed Jan. 6, 1982).

In addition, the application of limitations provisions in other statutes that do not expressly mention the States could also be affected. Although the court of appeals sought to restrict its holding to suits by states respecting title to public trust lands, the court's analysis is not clearly so limited. The *nullum tempus* rule invoked by the court would seem to apply to any limitations provision that speaks in general terms.

Finally, both the federal government and the States have an interest in obtaining a final resolution of the question whether the United States may raise the statute of limitations defense in 28 U.S.C. 2409a(f) in "[a]ny civil action" brought under the Quiet Title Act by a state. A uniform application of the statute throughout the nation is essential, since there is no justification for leaving states in one section of the country free to litigate old claims against the United States when sister states elsewhere do not have the same privilege. Of course, land disputes between the federal government and the States can be resolved by means other than litigation—legislation, agreements on land uses, and informal measures may be employed. The state of uncertainty regarding litigation of old claims produced by the decision below can only complicate the resolution of such controversies.

[9] In *California ex rel. State Lands Commission*, the district court issued an interlocutory decision barring the United States from raising the defense; its decision was cited, and in large part followed, by the court of appeals in this case. The action is still pending in the district court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 1982